

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

|  |   |                      |
|--|---|----------------------|
| In the Matter of                                 | ) |                      |
|  | ) |                      |
| Implementation of Section 621(a)(1) of the Cable | ) | MB Docket No. 05-311 |
| Communications Policy Act of 1984 as amended     | ) |                      |
| By the Cable Television Consumer Protection and  | ) |                      |
| Competition Act of 1992                          | ) |                      |

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
INITIAL COMMENTS**

NATIONAL TELECOMMUNICATIONS  
COOPERATIVE ASSOCIATION

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**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
INITIAL COMMENTS**

The National Telecommunications Cooperative Association (NTCA) <sup>1</sup> hereby submits these comments in response to the Federal Communications Commission's (FCC or Commission) Notice of Proposed Rulemaking (NPRM) soliciting comment on how it should implement Section 621(a)(1) of the Communications Act of 1934 as amended.<sup>2</sup> In its NPRM, the Commission questions whether the franchising process unreasonably impedes the federal goals of enhanced cable competition and accelerated broadband deployment and, if so, how the Commission should act to address the problem. In the experience of NTCA's members, the requirements of local franchising authorities (LFAs) do, on occasion, serve as barriers to entry. NTCA proposes six guidelines that the Commission can use to implement Section 621(a)(1)'s directive that LFAs not unreasonably refuse to award competitive franchises.

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<sup>1</sup> NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents 567 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members provide wireless, CATV, IPTV, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

## I. SUMMARY

On November 18, 2005, the Commission released an NPRM seeking comment on whether the FCC has the authority to preempt a LFA regulation that causes an unreasonable refusal to award a new entrant a competitive video franchise in contravention of Section 621(a)(1).<sup>3</sup> The Commission also sought comment on whether it is authorized to adopt mandatory rules that LFAs must follow or whether it is limited to providing LFAs specific guidelines that will help LFAs avoid federal preemption.

The Commission does have the authority to preempt any LFA regulation that causes an unreasonable refusal to award a new entrant a competitive video franchise in contravention of Section 621(a)(1). Section 636(c) explicitly grants the FCC the authority to preempt LFA rules and regulations that would be inconsistent with a provision of the Act. Any LFA rule that contravenes Section 621's provision against the unreasonable refusal of a competitive franchise, Section 628's goal of promoting increased competition in the multichannel video programming market, or Section 706's goal of promoting the deployment of advanced telecommunications capability to all Americans on a timely basis may be preempted in accordance with Section 636(c). Section 636(c) makes plain that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority or any provision of any franchise granted by such authority, which is inconsistent with the Act shall be deemed to be preempted and superseded."<sup>4</sup>

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<sup>2</sup> *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1934 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC 05-189 (rel. Nov. 18, 2005).

<sup>3</sup> Section 621(a)(1) states that a franchise authority may award one or more franchises within its jurisdiction and "may not unreasonably refuse to award an additional competitive franchise." Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of Section 635 for failure to comply with Section 621.

<sup>4</sup> NPRM p. 15, ¶ 3.

The Commission does not, however, have the authority to adopt mandatory LFA rules for granting competitive video franchise licenses. Section 621(a) does not specifically authorize the FCC to adopt rules that LFAs must follow. Nothing in Section 621(a) directs the FCC to adopt rules that LFAs must adhere to when deciding whether to grant a local franchise application. However, given the FCC's authority to preempt any LFA rule that may conflict with the Commission's goals of increasing video competition and encouraging the deployment of advanced telecommunications capability, the FCC can provide specific guidelines that LFAs may follow so that they can avoid federal preemption. NTCA proposes the following LFA guidelines for the Commission's consideration:

1. LFAs should not impose build-out requirements on new entrants seeking franchises in competitive local franchise areas.
2. LFAs should rule on franchise applications within 90 days.
3. LFAs should grant competitive providers an exemption from a public rights of way review if the provider already has permission to access public rights of way.
4. LFAs should refrain from imposing on new entrants any requirement not reasonably related to the provision of video service.
5. LFAs should limit the total amount of a new entrant's franchise application fee to not more than \$100.
6. LFAs should refrain from requiring a telecommunications provider to serve the entire franchise area, if the telecommunications carrier's service territory does not completely encompass the local franchise authority's service area.

NTCA recommends that these guidelines should apply only to new entrant competitive LFA applications and should not apply to existing incumbent cable television (CATV) local franchise agreements.

## II. INTRODUCTION

While more than 250 of NTCA's 567 members currently provide cable television service,<sup>5</sup> most do so utilizing hybrid coaxial cable and according to incumbent cable franchises awarded years ago.<sup>6</sup> Many more of NTCA's members are looking to get into the video business as a competitor to the incumbent cable provider. A 2005 survey of 161 of NTCA's members found that 63% of respondents not currently offering video service planned to do so by year end 2007.<sup>7</sup> NTCA therefore offers these comments from a unique perspective. While we represent the interests of our members looking to enter the video business, we must be mindful of the concerns of the nearly half of our members who operate as an incumbent.

Those NTCA members who are looking to provide a competitive video service report a variety of problems and delays associated with LFAs. Many of the problems are associated with build-out requirements. Some members have been subject to unreasonably short build-out periods or have been required to build out service to areas that are within a franchise territory, but outside of the carrier's own service territory. Other NTCA members have complained that the LFAs require them to accept franchise terms completely unrelated to the provision of video service. Another common complaint is that applications for franchising authority languish, unreasonably delaying the franchise process and the ability of competitors to offer service. Many of the LFAs' requirements are at best high hurdles for new entrants seeking to compete in

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<sup>5</sup> In its NPRM, the Commission cites an NTCA survey indicating that ninety-four percent of those who provide video service do so according to a cable franchise (NPRM, ¶ 8). The Commission uses this statistic as anecdotal evidence that new entrants have been able to obtain cable franchises. However, the survey respondents included both incumbent cable providers and new entrants. The responses should not be construed as evidence that NTCA's members have been able to obtain competitive cable franchises.

<sup>6</sup> Another 89 of NTCA's members offer direct broadcast satellite (DBS) service to their subscribers.

<sup>7</sup> *NTCA 2005 Broadband/Internet Availability Survey Report*. Available online at [www.ntca.org/content\\_documents/2005NTCABroadbandSurveyReport.pdf](http://www.ntca.org/content_documents/2005NTCABroadbandSurveyReport.pdf).

the video marketplace; at worst, some amount to complete barriers to entry. It is necessary and appropriate for the Commission to address the cable franchising requirements.

### **III. THE COMMISSION HAS THE AUTHORITY TO PREEMPT ANY LFA REQUIREMENT THAT AMOUNTS TO AN UNREASONABLE REFUSAL TO AWARD A NEW ENTRANT A COMPETITIVE VIDEO FRANCHISE**

The FCC tentatively concludes that pursuant to Sections 621(a) and 636(c) of the Act, and the Supremacy Clause, it may preempt any LFA requirement that causes an unreasonable refusal of a competitive video franchise. This conclusion is well-grounded in case law that focuses on LFA requirements and on the Commission's general scope of authority on preemption. For example, the Seventh Circuit Court of Appeals has held that Congress delegated to the Commission the authority to interpret Section 621 of the Communications Act and to determine what systems are exempt from franchising requirements.<sup>8</sup> The Eighth Circuit stated that the Communications Act grants the FCC exclusive jurisdiction to regulate interstate communication in the United States.<sup>9</sup>

The United States Supreme Court ruled that the Communications Act grants the FCC broad authority to take "all regulatory actions necessary to ensure the achievement of [its] statutory responsibilities."<sup>10</sup> The FCC retains the authority to preempt inconsistent state regulation in order to prevent such regulation from negating valid FCC policies.<sup>11</sup>

In exercising its authority under the Communications Act, the FCC may "pre-empt any state or local law that conflicts with [federal policy] or frustrates the purposes thereof."<sup>12</sup> When the Commission acts "within the scope of authority delegated to it by Congress," the

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<sup>8</sup> *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999).

<sup>9</sup> *Qwest Corp. v. Scott*, 380 F.3d 367, 370 (8th Cir. 2004).

<sup>10</sup> *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979).

<sup>11</sup> *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 (1986).

Commission's decision to preempt state law has the same legal force as a congressional decision to preempt state law by federal statute.<sup>13</sup>

Section 636(c) of the Act explicitly grants the FCC the authority to preempt LFA rules and regulations that would be inconsistent with a provision of the Act.<sup>14</sup> Any LFA requirement that contravenes Section 621(a)'s provision against the unreasonable refusal of a competitive franchise, Section 628(a)'s goal of promoting increased competition in the multichannel video programming market, or Section 706's goal of promoting the deployment of advanced telecommunications capability to all Americans on a timely basis, can and should be preempted.

#### **IV. THE COMMISSION SHOULD PROVIDE SPECIFIC GUIDELINES TO ASSIST LFAS IN AVOIDING FEDERAL PREEMPTION**

Nothing in the Act specifically authorizes or directs the FCC to adopt rules that LFAs must adhere to when deciding whether to grant a local franchise application or under what conditions. However, given the FCC's authority to preempt any LFA requirement that conflicts with the Commission's goals of increasing video competition and encouraging the deployment of advanced telecommunications capability, the FCC can and should provide specific guidelines to LFAs. Guidelines will provide a measure of certainty and stability to the industry and offer LFAs a clearer understanding of what requirements are reasonable and will not be preempted.

##### **A. LFAs Should Not Impose Build-Out Periods on New Entrants Seeking Franchises in Competitive Local Franchise Areas.**

The Commission's guidelines should include a provision that informs LFAs that they should not impose build-out periods for new entrants in the video market. Build-out

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<sup>12</sup> *City of New York v. FCC*, 486 U.S. 57, 64 (1988).

<sup>13</sup> *Qwest Corp. v. Scott*, 380 F.3d at 371; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 699; *Fidelity Fed. Sav. & Loan Association v. De la Cuesta*, 458 U.S. 141, 153-154 (1984).

<sup>14</sup> Section 636(c) of the Act states that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority or any provision of any franchise granted by such authority, which is inconsistent with [the Communications] Act shall be deemed to be preempted and superseded." 47 U.S.C. § 556(c).

requirements only make sense in a monopolistic environment or one in which certain benefits attach to the obligation.

Incumbent cable providers were subjected to specific build out periods because in many instances they were awarded exclusive rights to provide video service in an area.<sup>15</sup> There were no competitors for the service and subscribers were virtually guaranteed. There was no need for incumbents to consider economic principles of supply and demand in deciding where or when to offer service. In exchange for the benefit of the franchise award, the incumbent embraced, whether forcibly or not, certain obligations, including one to provide service to every potential subscriber within a specific time frame.

It does not make sense, and is potentially devastating to the business case of new entrants, to force new entrants to adhere to the same build-out obligations as incumbents. The benefit of a franchise award is no longer one of an exclusive right to provide service within an area. New entrants offer service to subscribers competing against a very well established incumbent. The risks are great and success is not at all guaranteed. Not only are incumbents well entrenched in the market, large incumbents often engage in predatory pricing behavior. The service provided by new entrants must be guided by sound business principles. Forcing new entrants to build-out an area before it can be financially justified is tantamount to forcing new entrants out of the video business.

When a new competitor enters an incumbent CATV provider's service area, the incumbent CATV can drop its prices for services significantly below its cost in the area where it faces competition. NTCA members have faced instances where incumbent cable operators have offered the deal of a lifetime to any subscriber who had switched to the competitor - a

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<sup>15</sup> With the possible exception of DBS competition in some areas.

switchback check for \$300 and a contract offering the same service as was received from the competitor for a mere \$5.00 a month for multiple years.

Large incumbent CATV providers can afford to predatory price video services in competitive areas because they can increase their prices for services in non-competitive areas.<sup>16</sup> A large incumbent CATV operator can use profits from non-competitive markets to subsidize below-cost prices in competitive markets. Large incumbent CATV providers typically do not offer these prices to everyone, but only to subscribers who have already gone to a competitor or are in the process of doing so. The below cost prices are made available or extended in an attempt to drive the competitor out of the market and thwart a new entrant's ability to recover its investment in a franchise area.<sup>17</sup>

Requiring a new entrant faced with a well established incumbent and/or predatory pricing to build-out an entire competitive local franchise area within a set period of time is impracticable and unrealistic. It will result in less video competition and will lead to many more new Internet

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<sup>16</sup> The Cable Television Consumer Protection and Competition Act of 1992 included a uniform rate requirement to prevent cable operators from having different rate structures in different parts of one cable franchise and to prevent cable operators from dropping the rates in one portion of a franchise area to under cut a competitor temporarily. 47 U.S.C. § 521(d). Normally, such practices would also violate the Sherman Act and/or Section 5 of the Federal Trade Commission Act. *See*, 15 U.S.C. § 2 and 15 U.S.C. § 45(a)(2). In the Telecommunications Act of 1996, however, Congress amended the uniform rate requirement to add an "effective competition" exception. 47 U.S.C. § 543(d). An incumbent cable operator need not comply with the uniform rate requirement if it is subject to "effective competition." Incumbent CATV providers are thus allowed to charge different prices to different segments of subscribers. The effective competition exception has been interpreted in a way that permits incumbent cable operators to engage in unfair practices. New entrant Internet Protocol TV (IPTV) providers by their entry into a video market may be the triggering event for the "effective competition" exception. 47 C.F.R. § 76.905(b)(4). The FCC has found that "effective competition" can be found to exist as long as the local exchange carrier (LEC) is planning to provide CATV or IPTV service in an area overlapping the incumbent's territory. *See, Commission Implements Cable Reform Rule Modifications: Provides Information of Cable Rate Regulation*, CS Docket No. 96-85 (March 29, 1999). "Potential as well as actual LEC service can be considered [to determine whether a cable operator is subject to effective competition.]" Under the FCC's interpretation of the LEC test, "effective competition" can be found even where the competitor has a minimal number of subscribers and where the vast majority of customers in a given area have no competitive alternative at all. Effective video competition will not be realized until this legal loophole is closed, preventing large, incumbent cable providers from engaging in practices intended to drive all competition from the market.

Protocol TV (IPTV) entrants failing to recover their investments in the competitive video distribution business. New, small IPTV entrants must be allowed the flexibility to alter their business/build-out strategies in order to hope to successfully compete with incumbent CATV providers. Incumbent CATV providers did not face competition when they were originally granted their right to provide video service in their local franchise areas. The original incumbent CATV providers were in effect granted a monopoly to build-out and serve their local franchise areas. Incumbents were virtually guaranteed the recovery of their build-out investments through the certainty that subscribers seeking CATV service in their local franchise area could only purchase video service from the incumbent CATV provider. New, small IPTV providers have neither the guarantee nor certainty that they will recover their investments. The video market alone should determine where and when competitors offer service. The Commission should therefore advise LFAs that requiring new entrants to build-out a competitive franchise area within a finite period would likely violate Section 621 of the Act.

**B. LFAs Should Rule on New Entrant Franchise Applications Within 90 Days.**

The Commission seeks comment on whether it should address maximum timeframes for LFAs to rule on a new entrant's application for a competitive franchise.<sup>17</sup> The Commission should provide LFAs with a specific guideline that establishes the maximum timeframe during which an LFA should rule on a new entrant's application for a competitive local franchise. NTCA recommends that maximum timeframe that an LFA should take to review, consider and rule on a new entrant's video franchise application be no longer than 90 days. Once an LFA

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<sup>17</sup> Congress was made aware of this and other anticompetitive practices of the multiple service operators (MSOs) in 2004. See, Testimony of the National Association of Telecommunications Officer and Advisors, United States Senate Committee on the Judiciary, *Cable Competition – Increasing Price: Increasing Value?* (Feb. 11, 2004).

<sup>18</sup> NPRM, ¶ 21, p. 11.

receives a complete application, 90 days is sufficient time for the LFA to review the application, request additional information, and then rule on the request.

Potential competitive video providers point out that applications tend to sit in the hands of LFAs for unreasonable periods of time before a ruling is issued. Bell South indicates that it takes, on average, 11 months to finalize a competitive local franchise agreement and that in some cases it takes three years to conclude negotiations.<sup>19</sup> NTCA is aware of a small, competitive IPTV provider who is in the process of negotiating a competitive franchise agreement that has taken longer than a year to finalize. These negotiations are time consuming, costly, and deprive consumers of a choice between multiple competitive video service providers. Such delays interfere with Section 628(a)'s goal of increasing competition and diversity in the multi-channel video programming market and increasing the availability of cable and satellite programming to persons in rural and other areas of the United States currently not able to receive such programming.

On February 9, 2006, Barry Smitherman, Commissioner with Texas Public Utility Commission (TPUC), outlined the recently enacted Texas statewide franchising mechanism. According to Commissioner Smitherman, the TPUC must act on a franchise application within 16 days and new entrants do not have a build-out requirement. As of February 3, 2006, a total of 15 companies had filed applications to serve 153 discrete communities in the State of Texas.<sup>20</sup> In addition, under pending Virginia state legislation (bills HB1404 and SB706) a new TV provider that applies for a franchise would have the right to start service in their service territory within 75 days and a municipality would have 45 days to negotiate the terms.<sup>21</sup> Similarly,

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<sup>19</sup> See *Comment of BellSouth Corp., et, al.*, MB Docket No. 05-255, p. 3 (filed Sept. 19, 2005).

<sup>20</sup> *Franchise Issues Dominate the FCC Video Competition Hearing*, by Lynn Stanton, TRDaily, February 10, 2006.

<sup>21</sup> *Cable, Telephone Compromise on Franchise Rules*, By Carolyn Shapiro, The Virginian-Pilot, February 3, 2006.

Section 617 of the Act limits the time in which an LFA may consider a request for approval of the sale or transfer of a cable franchise to 120 days. If an LFA does not rule on the request within 120 days, the request is deemed granted unless the requesting party and the LFA agree to an extension of time.

The longer the application process takes, the less likely it is that a competitor will successfully enter the market. Once an incumbent provider learns of a potential competitor's plans, it will adjust its pricing, advertising, and marketing strategies to attract new customers and retain its existing ones. It may address long-standing customer dissatisfaction issues or offer attractive packages with long-term commitments to customers. The longer the application process, the more entrenched the incumbent and the less likely it is that a new entrant will be able to gain a foothold. Further, every week that a new entrant is forced to delay roll out, the more money that is lost. Expenses accumulate while the wait continues. A long application process does, in fact, amount to a barrier to entry.

NTCA believes that a timeframe of 90 days is a reasonable period of time for a LFA to rule on a new entrant's competitive franchise application. Ninety days is within the range of timeframes established in current and pending state and federal legislation. This 90 day timeframe will also assist the Commission in achieving Congress' goal of increasing competition in the multi-channel video programming market and promoting the deployment of advanced telecommunications capability to all Americans on a timely basis.<sup>22</sup> NTCA recommends that the Commission provide LFAs with a specific guideline that establishes a 90 day maximum

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<sup>22</sup> Sections 628 and 706 of the Act. Section 706, titled Advanced Telecommunications Incentives, states the FCC and state commissions shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans by utilizing .... measures to promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment. Section 706 also defines advanced telecommunications capability is defined as any transmission media or technology, as

timeframe during which an LFA should rule on a new entrant's application for a competitive local franchise.

**C. LFAs Should Grant Competitive Providers an Exemption from a Public Rights of Way Review if the Provider Already Has Permission to Access Public Rights of Way.**

The Commission seeks comment on whether Section 621(a)(1) permits the imposition of greater restrictions on the authority of LFAs with respect to facilities-based telephone and/or broadband service providers that already have permission to access public rights of way within a local franchise area.<sup>23</sup> The Commission guidelines should inform LFAs that they should allow telecommunications carriers that already have permission to access public rights of way within the local franchise area an exemption from a public rights of way review as part of the franchise application process. NTCA's members generally use existing or upgraded facilities and plant to provide video service to their subscribers. They already have access to the public rights of way to provide service. The review requirement may have made sense when incumbent cable providers were first entering the market to provide service. Now, it is nothing more than a repetitive waste of time and resources for new entrants who already have access to the public rights of way. It delays the application process and impedes the deployment of competitive video services. The Commission should therefore advise LFAs that when reviewing an application of a new entrant with existing permission to use the public rights of way, the new entrant should be exempt from a public rights of way review as part of the competitive local franchise application process.

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high-speed, switched, broadband telecommunications capability that enables users to originate and receive high quality voice, data, graphics, and video telecommunications using any technology.

<sup>23</sup> NPRM, pp. 11-12, ¶ 22.

**D. LFAs Should Refrain from Imposing on New Entrants any Requirement Not Reasonably Related to the Provision of Video Service.**

It is appropriate for the Commission to adopt a guideline informing LFAs that they may not condition franchise awards on provisions not reasonably related to the provision of video service. NTCA's members tell of LFAs tacking on multiple provisions to franchise agreements. LFAs may see the franchising process as an opportunity for the franchised territory. For example, LFAs may require new entrants to participate in public works projects that the applicant would not otherwise agree to without receiving monetary compensation from the LFA. The new entrants are held hostage to the whims of the LFAs and have no choice but to accept the terms or abandon the franchise application.

Some argue that unrelated franchise requirements are fair if the incumbent already abides by them. They point out that a new entrant is accepting only the same concessions the incumbent agreed to when it received its franchise award. The incumbents argue that the franchise terms must be similar to create a "level playing field." However, the original concessions of the incumbents were made in exchange for the exclusive franchise rights within the territory. The incumbents were guaranteed subscribers and a reliable revenue stream. Today, the requirements only serve to prevent competition. The unrelated requirements seem to delay service and increase costs for new entrants and their subscribers. New entrants must fight for every subscriber and will not survive if forced into expensive non-video related projects.

Franchise requirements that are costly, unnecessary, and bear no relation to the provision of quality video service must be prohibited. New entrants should not be forced into accepting contractual terms that would impede the reasonable and timely deployment of advanced telecommunications capability and LFAs should not be able to impose requirements that delay increased competition in the multi-channel video programming market. The Commission should

issue a guideline recommending that LFAs refrain from imposing any franchise requirements not reasonably related to the provision of video service on new entrants during or after the application process.

**E. LFAs Should Limit the Total Amount of a New Entrant's Franchise Application Fee To Not More Than \$100.**

The Commission should inform LFAs that they risk preemption if they impose exorbitant franchise application fees on new entrants. Some LFAs have imposed application fees on CATV and IPTV providers ranging from \$1,000 to \$10,000. Conversely, some LFAs have imposed much more reasonable LFA applications fees ranging from \$25 - \$100. Extremely high application fees can prohibit or delay video services of small IPTV providers seeking to enter the multi-channel video distribution market. High application fees also unduly increase a new entrant's cost of providing competitive video services. To assist the Commission in achieving its goals of preventing unreasonable LFA requirements, increasing video competition, and promoting the deployment of affordable broadband services to all Americans on a timely basis, the Commission should issue a specific LFA guideline limiting the amount of a new entrant's LFA application fee to not more than \$100.<sup>24</sup> Such a guideline will make clear to local franchise authorities as to what is a reasonable application fee and assist LFAs seeking to avoid potential federal preemption.

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<sup>24</sup> This proposed \$100 limit would apply only to a new entrant's one-time competitive LFA application fee and does not affect a local franchise authority's statutory right to collect annual franchise fees from video providers with franchise licenses.

**F. LFAs Should Refrain From Requiring a Telecommunications Provider to Serve the Entire Local Franchise Area, If the Telecommunications Carrier's Service Territory Does Not Completely Encompass the Local Franchise Authority's Service Area.**

The Commission identifies in the NPRM that the areas served by telecommunications carriers frequently do not coincide perfectly with the jurisdiction and service territory of the relevant local franchise authority.<sup>25</sup> NTCA requests that the Commission issue a specific guideline that local franchise authorities should refrain from requiring a telecommunications provider offering CATV or IPTV service to serve the entire franchise area, if the telecommunications carrier's service territory does not completely encompass the local franchise authority's service area.

Some small rural telephone companies' service areas fall within a larger local franchise area. These small companies currently have infrastructure to provide IPTV service within their existing incumbent local exchange carrier (ILEC) service area within the local franchise area, but not throughout the entire local franchise area. Some of these small, rural IPTV providers do not wish to be competitive local exchange carriers (CLECs) or competitive IPTV providers beyond their current ILEC service territory. Requiring these rural ILECs to provide video services beyond their local service areas is expensive and would prohibit some of these carriers from offering video services to any community. The end result would be preventing or delaying increased video competition in some rural communities.

Denying a new entrant's application because the new entrant cannot justify building-out its network beyond its local service area would be unreasonable and contravene Section 621(a)(1) of the Act. The Commission should therefore issue a specific guideline that local

franchise authorities should refrain from requiring a telecommunications provider to serve the entire franchise area, if the telecommunications carrier's ILEC service territory does not completely encompass the local franchise authority's service area.

## **V. CONCLUSION**

Based on the above stated reasons, the Commission does have the authority to preempt any LFA regulation that causes an unreasonable refusal to award a new entrant a competitive video franchise in contravention of Section 621(a)(1). Given the FCC's authority to preempt any LFA rule that may conflict with the Commission's goals of increasing video competition and encouraging the deployment of advanced telecommunications capability, NTCA urges the Commission to issue the following LFA guidelines to assist local franchise authorities in the efforts to avoid federal preemption:

1. LFAs should not impose build-out requirements on new entrants seeking franchises in competitive local franchise areas.
2. LFAs should decide on franchise applications within 90 days.
3. LFAs should grant competitive providers an exemption from a public rights of way review if the provider already has permission to access public rights of way.
4. LFAs should refrain from imposing on new entrants any requirement not reasonably related to the provision of video service.
5. LFAs should limit the total amount of a new entrant's franchise application fee to not more than \$100.
6. LFAs should refrain from requiring a telecommunications provider to serve the entire franchise area, if the telecommunications carrier's service territory does not completely encompass the local franchise authority's service area.<sup>26</sup>

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<sup>25</sup> NPRM, ¶23, p. 12.

<sup>26</sup> These guidelines should apply only to new entrant competitive LFA applications and should not apply to existing incumbent CATV local franchise agreements.

Respectfully submitted,

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February 13, 2006

## CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Initial Comments of the National Telecommunications Cooperative Association in MB Docket No. 05-311, FCC 05-189 was served on this 13th day of February 2006 by electronic mail to the following persons.

/s/ Gail Malloy

Gail Malloy

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